

CWA § 404 Assumption Dredge and Fill Permit Program

Presentation at 26th Annual R9 Tribal/EPA Conference

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Why Are We Here?

- EPA is encouraging States and tribes to assume the Clean Water Act Section 404 Program (CWA §404(g))
- Provide tribes with information regarding CWA Section 404 assumption
- EPA is seeking input on how the CWA section 404(g) regulations could be updated and improved to increase interest in assuming CWA 404 permitting authority

2

If they want to take it on

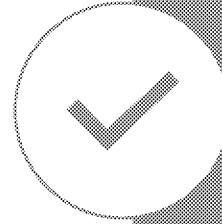
Arizona is taking it on – what does it mean for the tribes – corps retains permit authority on tribal lands

States need to consult with tribes and receive comments

If state can't address comments the state needs to send the permit along with comments and why they couldn't be address

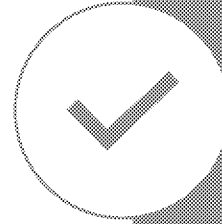
What Is 404 Program Assumption?

- Under Section 404 of the CWA, a permit is required before dredged or fill material can be discharged into waters of the US
- CWA Section 404(g) enables tribes and states to assume administration of the dredge and fill permitting program for certain waters
 - Only Michigan (1984) and New Jersey (1994) have assumed this authority
 - Army Corps of Engineers issues permits for all other jurisdictional waters
 - EPA oversees assumed programs
- CWA Section 404(g) and 40 CFR Part 233 describe:
 - Tribal and state program requirements
 - EPA responsibilities: approval and oversight of assumed program
 - Requirements for review, modification, and withdrawal of assumed program (as necessary)



Why Assume the 404 Program?

- Why assume? Tribes and states have said:
 - Streamline permitting – reduce permitting timeframes and ability to coordinate with other tribal and state water and land use programs
 - Eliminate unnecessary duplication between programs
 - Knowledge of and closer to the water resources
 - Consistency with other CWA programs implemented by Tribes and States
- What barriers have tribes and states identified?
 - Lack of dedicated funding
 - Lack of clarity on assumption process and requirements including which waters are assumable



What Are the Requirements for Assumption?

- A tribal or state assumed program must be consistent with and no less stringent than the CWA and regulations.
- Assumed **program must include**, but is not limited to:
 - Permitting procedures;
 - Administrative and judicial review procedures;
 - Regulating discharges into all assumed waters within the tribe or state's jurisdiction;
 - Regulation of at least the same scope of activities as the section 404 program;
 - Provisions for public participation;
 - Meeting public notice requirements;
 - Permit issuance consistent with the environmental review criteria known as the CWA section 404(b)(1) Guidelines;
 - Compliance and enforcement authorities as specified in the regulations; and
 - Coordination procedures with federal agencies, adjacent states and tribes.

What is EPA's Role in Assumption?

- **Prior to assumption**
 - Work with tribes and states to enhance capacity/capability and develop programs
 - Wetland Program Development Grants can fund capacity building
- **Evaluate and approve/disapprove assumption request**
 - Includes tribal consultation prior to decision
- **Oversight of assumed program**
 - Review and comment on permits
 - Review of modifications of assumed program
 - Withdraw program approval, if needed

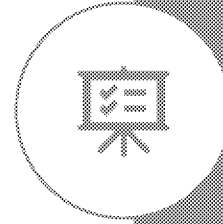
What is the Tribe's or State's Role when a Program is Assumed?

- Tribe or state transmits to EPA notice of every permit application received
- EPA reviews permits where EPA review is not waived
 - Review and comment
 - EPA seeks comments from other agencies
- Tribe or state shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed

Explain what not waived permit means

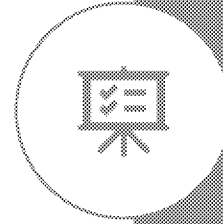
EPA Revising the CWA Section 404(g) Regulations

- First comprehensive revision to the existing CWA section 404(g) regulations since 1988
- Tribal consultation and coordination - October 22 - December 21, 2018
 - Consultation letters signed October 18, 2018
 - To view consultation letter and materials, visit: <https://tcots.epa.gov>
- EPA is seeking early input in the development of regulatory policies that may have tribal implications



Engagement Opportunities

- **November 20, 2018** – Tribes-only Information Webinar – 2:00-4:00 Eastern Time
 - To register: <https://epawebconferencing.acms.com/tribes-404g-rulemaking-mid-november/event/registration.html>
 - Call-in: 1-866-299-3188; Code: 202-566-1269
- **November 29, 2018** – Tribes-only Information Webinar – 2:00-4:00 Eastern Time
 - <https://epawebconferencing.acms.com/tribes-404g-rulemaking-late-november/event/registration.html>
 - Call-in: 1-866-299-3188; Code: 202-566-1269
- **Individual Tribal Government Consultation Meetings**, upon request as time and resources allow. To request a meeting please contact: EPA at 404g-rulemaking@epa.gov



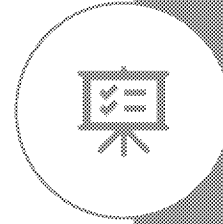
Submitting Comments on Revised 404(g) Regulations

- **How to submit Tribal Consultation comments:**

- Comments can be submitted to 404g-rulemaking@epa.gov and copied to Gude.Karen@epa.gov

- **How to submit public comments:**

- EPA will open a public comment period when the Agency publishes in the Federal Register any proposed revisions to the Section 404(g) regulations
- We anticipate this being early calendar year 2020



For More Information

Headquarters

- Kathy Hurl (202) 566-1269
- Lauren Kasperek (202) 564-1896
404g-rulemaking@epa.gov

Region 9

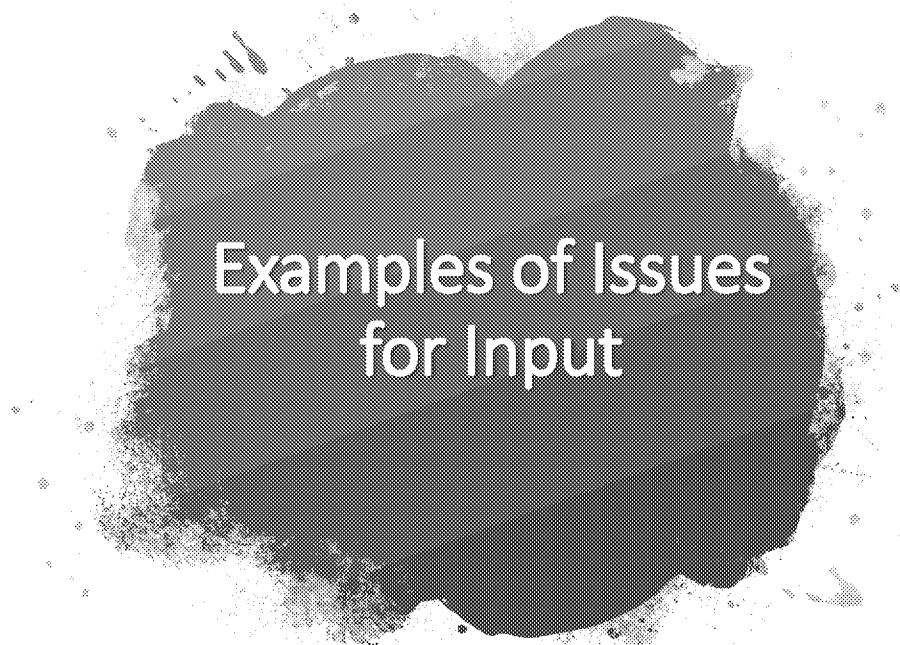
- Sam Ziegler (415) 972-3399
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- Elizabeth Goldman (415) 972-3398
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EPA 404 assumption website: <https://www.epa.gov/cwa404g>



Thank You!

12



Examples of Issues for Input

13

Issue #1: Clarifying Assumable Waters

Background:

- States and tribes can assume administration of the CWA section 404 program only in certain waters. The USACE retains permitting authority for:
 - Tidal waters and their adjacent wetlands
 - Waters used as a means to transport interstate or foreign commerce and their adjacent wetlands
- Retained waters further clarified in recent US Army memo:
 - August 7, 2018, memo describes which waters are to be retained by USACE when state or tribe assumes waters
 - Based upon 2017 recommendations from EPA federal advisory committee on assumable waters (<https://www.epa.gov/cwa-404/assumable-waters-sub-committee>)

14

But why is this confusing? Section 404(g)(1) of the CWA says “(g) State administration (1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.”

Issue #1: Identification of “Retained” & “Assumed” Waters

- The scope of assumable and retained waters:
 - Should the EPA codify the Subcommittee majority’s recommendation that USACE retain section 10 waters of the Rivers and Harbors Act?
 - If yes, how should post-assumption changes to the USACE’s section 10 list be treated? What process should be used?
- Which adjacent wetlands should be retained:
 - EPA appreciates any information that might support the Subcommittee majority’s “default” 300 foot administrative line - USACE retains wetlands waterward of the line.
 - Should a different “default” value be considered?
 - Should there be no default distance in light of differing wetlands characteristics among different eco-regions?
- Who (tribe/state or USACE) should have administrative permitting authority over discharges that extend across the administrative line?

15

With respect to the administrative division of authority to administer the CWA section 404 program, EPA would appreciate comments and recommendations on clarifying:

Issue #2: Partial Assumption

- Would more tribes be likely to assume the program if partial assumption were allowed?
- How might partial assumption, if permissible, work in a manner that is easily understood by the regulated community and practical in its application?
- How would partial assumption differ from USACE-issued State Programmatic General Permits (SPGP)? Do these SPGPs offer the flexibility being sought under a partial assumption framework?

16

The current regulations do not allow for partial assumption of the program. Some have suggested revisions to allow part of the program to be assumed, e.g., certain watersheds or activities:

Issue #3: Consistent With and No Less Stringent Than

Background: CWA requires assumed programs to issue permits consistent with the CWA section 404(b)(1) Guidelines (40 CFR Part 230) which are no less stringent than federal permits (33 U.S.C. § 1370)

- How should tribes and states address aspects of the section 404(b)(1) guidelines that refer to other federal laws? e.g., National Historic Preservation Act
- How tribes and states could ensure their 404 permits do not adversely affect threatened and endangered species since this is not a federal action?

17

EPA would appreciate comments and recommendations on the following questions:

Remember consultation under section 7 of the ESA applies to federal actions.

Other Potential Issues Under Consideration

- **Process for Identifying assumable and retained waters**
 - The Subcommittee laid out a process for the how the state or tribe, the USACE, and the EPA would work together during assumption.
 - Are the ways to improve this suggested process or tailor it for the individual needs of tribes?
- **What practices** should be followed when it becomes necessary for the tribe or state to issue a permit to itself? e.g., a highway project
- **Mitigation**, there are many considerations including:
 - Should establishment and composition of interagency review teams (IRTs) differ in under assumed programs? If so, how?
 - How might existing mitigation banks containing assumed waters continue operation following assumption?

18

These are other issues we are thinking about and we welcome any feedback.